80-1274

No.

Office-Supreme Court, U.S.
FILED
JAN 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ANDREW C. CONNOR,

Petitioner,

v.

UNITED STATES OF AMERICA and
THE DEPARTMENT OF THE ARMY, an agency
of the United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT T. MEADOWS, III
P.O. Drawer 712
Auburn, Alabama 36830
(205) 821-2800
Attorney for Petitioner.

Of Counsel:
HARPER & MEADOWS
233 East Magnolia Avenue
Auburn, Alabama 36830

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED FOR REVIEW

Whether the Privacy Act of 1974 and its legislative history require the exhaustion of administrative remedies prior to filing suit where the information sought to be corrected or amended is contained in a separate, secret or private file whose precise whereabouts and contents are unavailable and unknown to the Petitioner despite repeated efforts on his part to gain access to them, where resort to administrative remedies would be futile, where the existence and effect of certain administrative remedies were never made known to the Petitioner and, in fact, where the Petitioner was informed that no administrative remedies existed.

Whether the submission of improper or false pleadings by the Respondents effectively denying the Petitioner a *timely* opportunity to correct the record should entitle the Petitioner to a decree.

Whether an agency of the United States may provide *knowingly false* and derogatory information about an individual without the prior written consent of, or a prior written request by, the individual to whom the information pertains, particularly in view of the legislative history of the Act.

PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the names of all parties to this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES INVOLVED IN THESE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES

Cases iii

Statutes iii

Miscellaneous Authorities iv

OPINIONS OF THE LOWER COURTS 1

JURISDICTIONAL GROUNDS 2

APPLICABLE STATUTES 3

STATEMENT OF THE CASE

Nature of the Case 4

Course of Proceedings 4

Statement of the Facts 7

ARGUMENT 13

The Privacy Act of 1974 and its legislative history do not require the exhaustion of administrative remedies under the circumstances 14

The submission of improper or false pleadings by the Respondents effectively denying the Petitioner a timely opportunity to correct the record should entitle the Petitioner to a decree 21

An agency of the United States may not provide knowingly false and derogatory information about an individual without the prior written consent of, or a prior written request by, the individual to whom the information pertains, particularly in view of the legislative history of the Act 24

CONCLUSION 26

APPENDICES:

Appendix A – District Court Judgment 1a

Appendix B – District Court Opinion 2a

Page

Appendix C – U.S. Court of Appeals for the Sixth Circuit Opinion 8a

Appendix D – Order of U.S. Court of Appeals for the Sixth Circuit on Rehearing 9a

Appendix E – Privacy Act of 1974 . . . . . 10a

TABLE OF AUTHORITIES

Cases:

Churchwell v. United States, 414 F.Supp. 499 (N.D.S.D. 1976), affm'd 545 F.2d 59 (8th Cir. 1976) 16-17

Connor v. United States, 627 F.2d 1089 (6th Cir. 1980) 2-7

Glover v. St. Louis-S.F.R. Co., 393 U.S. 324 (1969) 16-17

Dows v. McMichael, II pg., 345 23

Hall v. United States Civil Service Commission, 533 F.2d 695 (D.C. Cir. 1976) 16-18

Harper v. Kobelinski, 589 F.2d 721 (D.C. Cir. 1978) 16-18

Harrison v. Northern Trust Company, 317 U.S. 476 (1943) 19

Kennedy v. Creswell, 101 U.S. 641 (1880) 22

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 15

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 26

Steiner v. Mitchell, 350 U.S. 247 (1956) 19

United States v. American Trucking Association, Inc., 310 U.S. 534 (1940) 19

Vaca v. Sipes, 386 U.S. 171 (1967) 17

Wood v. Strickland, II Ves. B., 150 23

Zuber v. Allen, 396 U.S. 168 (1969) 19

Statutes:

Privacy Act of 1974, 5 U.S.C. §552a 3, 4, 15, 24

Rule 56, Federal Rules of Civil Procedure 26

Page

Miscellaneous Authorities:

Legislative History of the Privacy Act of 1974, S.3418 (Public Law 93-579) 20, 25

Senate Report Number 93-724. 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

ANDREW C. CONNOR,

Petitioner,

v.

UNITED STATES OF AMERICA and
THE DEPARTMENT OF THE ARMY, an agency
of the United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS OF THE LOWER COURTS

On November 9, 1979, the United States District Court for the Western District of Kentucky granted a Motion for Summary Judgment filed by the Respondents on the grounds that the Petitioner had failed to exhaust administrative remedies and that in any event the party

receiving the information had a legitimate need to know. Simultaneously, the Court denied a Motion for Partial Summary Judgment filed by the Petitioner. This Summary Judgment and its accompanying Memorandum Opinion has not been published.

The case was then appealed to the United States Court of Appeals for the Sixth Circuit. After submission of briefs and oral argument, the Sixth Circuit Court of Appeals without opinion affirmed the District Court's order and judgment on July 31, 1980. See *Connor v. United States*, 627 F.2d 1089 (6th Cir. 1980). Subsequently, a petition or motion for rehearing and suggestion for rehearing en banc was filed and on October 8, 1980, the Clerk of the Sixth Circuit Court of Appeals entered an order denying said motion. That order has not been published.

Copies of the Orders of the United States Court of Appeals for the Sixth Circuit together with copies of the Summary Judgment and Memorandum Opinion of the United States Court of Appeals for the Western District of Kentucky are included in the Appendix hereto.

JURISDICTIONAL GROUNDS

As stated hereinabove, on July 31, 1980, the United States Court of Appeals for the Sixth Circuit affirmed the order and judgment of the United States District Court for the Western District of Kentucky, said District Court order having been made and entered on November 9, 1979. Subsequently, a petition or motion for rehearing and suggestion for rehearing en banc was denied on October 8, 1980. Justice Potter Stewart on December 29, 1980, granted an application for an extension of time to and including January 27, 1981 (Application, No. A-560) within which to file this petition.

The statutory provisions believed to confer on this Court jurisdiction to review the order and judgment of the Sixth Circuit Court of Appeals by Writ of Certiorari are as follows:

1. The United States Court of Appeals for the Sixth Circuit has rendered herein or adopted herein a decision which is in conflict with the pronouncements of the United States Circuit Courts of Appeals for the District of Columbia and for the Eighth Circuit on the same matter;

2. The United States Court of Appeals for the Sixth Circuit has rendered herein or adopted herein a decision which is in conflict with the pronouncements of this Court on the same or similar matter;

3. The United States Court of Appeals for the Sixth Circuit has effectively decided an important question of federal law which has not been, but which should be, settled by this Court;

4. The United States Court of Appeals for the Sixth Circuit has so far sanctioned a departure by the United States District Court for the Western District of Kentucky from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory powers.

APPLICABLE STATUTES

The statutes applicable to this matter are those contained in the Privacy Act of 1974, 5 U.S.C. §552a. These statutes are set forth in pertinent part in the Appendix.

STATEMENT OF THE CASE

1. NATURE OF THE CASE:

This is a civil action in which the Petitioner seeks monetary damages under the Privacy Act of 1974, 5 U.S.C. §552a, for violations of his rights as set forth under that act. The Respondents are the United States of America and the Department of the Army, an agency of the United States, for whom the Petitioner was working at the time the subject violations occurred.

The gravamen of the Complaint is among other things that the Respondents (1) maintained and disclosed information and opinions not contained in the regular personnel file; (2) maintained a separate "unofficial" personnel file; (3) disclosed information and opinions from the "unofficial" file without obtaining permission from the Petitioner and without notice to the Petitioner; and, (4) gave no opportunity to the Petitioner to correct or counter this information nor made any effort to determine the validity of the information disclosed or to correct that information.

2. COURSE OF PROCEEDINGS:

On December 31, 1975, the Petitioner filed suit in the United States District Court for the Western District of Kentucky, alleging violations of the Privacy Act of 1974 and claiming damages for said violations. The basis for federal jurisdiction in that Court was the Privacy Act itself which confers such jurisdiction. See 5 U.S.C. §552a(g)(1).

The Respondents moved to dismiss this action *inter alia* on the ground that there had been a failure to exhaust available administrative remedies. This motion was filed on March 18, 1976.

Although the Petitioner opposed this Motion to Dismiss, the District Court dismissed the Petitioner's suit without prejudice for failure to pursue administrative remedies on March 8, 1977. Subsequently, on March 16, 1977, the Petitioner moved to set aside the Judgment of Dismissal. However, the Respondents opposed reconsideration and the District Court denied reconsideration on May 1, 1977.

Thereafter, the Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, case number 77-3329. During the pendency of that appeal, the Petitioner on *October 11, 1977,* filed a second complaint in the United States District Court for the Western District of Kentucky alleging the same or similar Privacy Act violations, seeking damages for said violations and basing federal jurisdiction on the Privacy Act itself.

On March 30, 1978, the Respondents moved to remand the appeal which was at that time pending in the United States Court of Appeals for the Sixth Circuit. The Motion was granted and the first and second complaints were consolidated before the District Court.

The Petitioner filed a Motion for Partial Summary Judgment on March 12, 1979, on the grounds that (1) the Respondents maintained a separate file in violation of the Privacy Act; (2) the Respondents violated the Privacy Act by releasing information contained in the petitioner's personnel records without his prior written consent; (3) the evidence supported the conclusion that the above-named violations were willful and malicious; and, (4) the Army has a consistent record of distortion vis-a-vis the Petitioner. Prior to this, namely, on October 21, 1976, the Petitioner filed a memorandum in support of a similar motion and simultaneously requested the ap-

pointment of a special prosecutor to investigate the situation.

The Respondents filed their response in opposition to this motion for partial summary judgment and their own Motion to Dismiss, or, in the Alternative, for a Summary Judgment. The Respondents contended the following: (1) the District Court lacked subject matter jurisdiction since the information allegedly disclosed was not within a "system of records" and, therefore, did not fall within the Privacy Act; (2) assuming that the information was within a "system of records", there was no Privacy Act violation since disclosure is permitted to officers and employees who have a need for the record in the performance of their duties; (3) Petitioner had failed to exhause his administrative remedies; and, (4) Petitioner failed to allege a cause of action upon which relief could be granted since he has not shown that the Government acted willfully or intentionally.

Subsequently, on November 9, 1979, the District Court rendered judgment for the Respondents by treating their Motion to Dismiss or in the Alternative, for Summary Judgment as a Motion for Summary Judgment and granting the same, while at the same time denying the Motion for Partial Summary Judgment filed on behalf of the Petitioner.

The basis for this decision was in the first instance that the Petitioner had failed to exhaust his administrative remedies available under the Privacy Act and in the second instance that the disclosure of information under the circumstances was justified on a "need to know" basis.

This decision was appealed to the Court of Appeals for the Sixth Circuit and was affirmed without opinion on

July 31, 1980. See *Connor v. U.S.*, 627 F.2d 1089 (6th Cir. 1980). A petition or motion for rehearing and suggestion for rehearing en banc was filed and on October 8, 1980, denied. An application for an extension of time to and including January 27, 1981, within which to file this petition was granted on December 29, 1980. (Application No. A-560). From the denial of rehearing, the Petitioner files this his Petition for Writ of Certiorari.

3. STATEMENT OF THE FACTS:

Dr. Andrew C. Connor began work for the United States Army at Fort Knox, Kentucky, in June, 1974, as an Operations Research Analyst for the Armor Reconnaissance Scout Vehicle Task Force (ARSV). His first assignment was to evaluate the need for mobility and agility in scout vehicles. The Petitioner felt that tests should be performed to assist in this evaluation. His supervisor on this project, Col. Robert Sunnel, disagreed with Dr. Connor on the need for the testing and asked Dr. Connor to recommend against it.

The tests were eventually held despite Col. Sunnel's objections and they proved to be a success. *After* the testing, a Col. Archibald of Fort Knox ordered the Petitioner to write a report in the future tense or be fired. If the report had been written in the future tense, it would appear to be a test plan and not an historical document. Therefore, the objections of Col. Sunnel, which proved to be unfounded, would be covered up and swept under the rug. Obviously, Col. Sunnel didn't appreciate the Petitioner's refusal to protect him by falsifying the documents. Later, Dr. Connor was fired, making a prophet of Col. Archibald.

Dr. Connor was then assigned to Combat Development where his initial duty was to go to the Armor Officer Basic Course. This he did. After completion of the

course, he was assigned as the Fort Knox representative to work on the Mechanized Infantry Combat Vehicle (MICV) Special Study Group (MSSG) at Fort Benning, Georgia. He was in Fort Benning for one week in December, 1974. Beginning in January of 1975, Dr. Connor remained in Fort Benning as the Fort Knox representative on the MSSG project until July, 1975.

The purpose of the MSSG was to prepare an individual to represent the Army before Congress concerning the MICV program. Gen. William DePuy met in February, 1975, with several individuals to prepare for this appearance. During this meeting Gen. DePuy stated on tape that "Honesty is out—cleverness and cunning are in". The implications from this statement are obvious.

Upon his departure from Fort Benning, Col. Roy S. Dunaway, Assistant Director of MSSG, indicated to Dr. Connor that he would write a letter of appreciation and send it to him.

When Dr. Connor returned to Fort Knox on July 1, 1975, he discussed his Fort Benning trip with Col. Clark A. Burnett, his then supervisor at Fort Knox, and rendered a timely trip report. At no instance during this time was any criticism of his performance forthcoming. However, on July 31, 1975, Col. Burnett presented Dr. Connor with copies of letters which he had received from Fort Benning. These letters were derogatory in nature.

Dr. Connor pointed out to Col. Burnett that he was in fact being paid by Fort Knox rather than by Fort Benning during his stay there. Thus, a letter such as the one mentioned hereinabove which was purportedly from Dr. Connor's supervisor was not in fact from his supervisor since his supervisor would have been located at Fort Knox, the origin of his pay.

Col. Burnett indicated that he understood this and stated that he thought the reason for such a letter regarding Dr. Connor was that Fort Benning personnel attributed the firing of the then commanding general of Fort Benning to a report which had been written by Dr. Connor. Furthermore, Col. Burnett at this time discussed with Dr. Connor an upcoming promotion for him indicating that it would be appropriate and necessary to delay such promotion until he had had the opportunity to directly supervise Dr. Connor for a period of time.

On August 4, 1975, Col. Burnett's secretary presented Dr. Connor with a letter purportedly memorandizing the conversation with Col. Burnett of July 31, 1975. It was not in fact truthful and accurate. Dr. Connor then went to the Civilian Personnel Office to contest both this letter and the Fort Benning letters. Upon inquiry he was shown that his official file contained no derogatory information and was told that he could take no action because of this. His inability to take any action because of the absence of the derogatory information was reiterated by Col. Edward P. Davis, Col. Burnett's supervisor.

Dr. Connor received no evaluation on September 1, 1975, or October 1, 1975, which, according to Civil Service Regulations, indicates satisfactory performance. Shortly after October 1, 1975, Col. Burnett in response to Dr. Connor's inquiry about his promotion indicated that though there were no complaints about his work, the fiscal constraints placed on the agency prevented a promotion. Col. Burnett further indicated that project expenditures were such that justification for the promotion would be difficult. However, he did ask Dr. Connor to work on the Army Affordability Study which was given top priority by the Army Chief of Staff. Dr. Connor was subsequently assigned as personal representa-

tive of the commanding general of Fort Knox to Fort Leavenworth, Kansas.

A concurrent assignment was the Remotely Monitored Battlefield Censored System (REMBASS) project. In connection with this project, on October 21, 1975, Col. Burnett told Dr. Connor in the presence of other civil service employees and army officers that his (Dr. Connor's) report on the REMBASS Costs and Operations Effectiveness Analysis (COEA) was poorly done. Yet, Dr. Connor's report was the same as that of Training and Doctrine Command (TRADOC), the command to which Fort Knox reports. Additionally, the document was in and of itself (SECRET) and Col. Burnett should have had no access to the same. Incidentally, all of Dr. Connor's recommendations were accepted by the REMBASS study group at Fort Leavenworth and acknowledgment of the same was incorporated in the next COEA.

Another of Dr. Connor's assigned projects was the Military Operations in Built Up Areas (MOBA). Initially, Fort Knox was asked through their representative to submit a written report to the Mobile Study Group at Fort Leavenworth, Kansas. Col. Burnett did not wish to get overly involved in this project and as a result thereof recommended that the appropriate chapter from the training manual which had just been completed by Fort Knox suffice for the report required. The author of the training manual, namely, a Col. Scribner, felt such a response would be inappropriate. Through Col. Scribner's efforts, a response authored by Dr. Connor was submitted to Fort Leavenworth. This report proved to be most helpful and one of the best received by Fort Leavenworth.

A briefing in connection with this report was to be presented at Fort Leavenworth by Dr. Connor. A

preliminary written brief prepared by Dr. Connor was approved by Col. Scribner and Col. Robert E. Ley and a written copy presented to Col. Burnett. At the time of its presentation to him, on Friday, December 5, 1975, Col. Burnett became highly incensed and indicated that he would force Dr. Connor to resign from the civil service.

The following Monday, December 8, 1975, Dr. Connor visited the Civilian Personnel Office and inquired as to what steps he could take in regard to the previously described actions of Col. Burnett. Ms. Dorothy Hood indicated to him that there was a secret file on him which he could see but not copy. This file contained the "Fort Benning Letters", the letter of August 4, 1975, and a letter dated October 29, 1975, which Dr. Connor had not previously seen.

During this time Dr. Connor had made preliminary inquiries at Fort Rucker, Alabama, and Fort Leavenworth, Kansas, as to possible job openings. Shortly after the December 8, 1975, visit to the Civilian Personnel Office, Dr. Connor talked to the representatives at Fort Rucker and Fort Leavenworth and was informed by both of them that the contents of the secret file had been verbally presented to them. Dr. Connor then attempted to see the commander of Fort Knox who was the individual listed in the Federal Register to whom inquiries should be made regarding the location of all personnel records. Dr. Connor was told by the general's aide that the general knew all about the complaints and still refused to see Dr. Connor. On December 31, 1975, the first complaint in this cause was filed.

Sometime during the first week of January, 1976, Col. Burnett indicated to Dr. Connor that he would wipe the slate clean and begin anew with regard to Dr. Connor's activities. Dr. Connor was then assigned to evaluate the

Joint-Services Internal Intrusion Detection Systems (J-SIIDS), a burglar alarm system. Dr. Connor's investigation revealed that the system was very inadequate and frankly, a waste of government money. Once this was conveyed to the appropriate individuals, Dr. Connor, as recognition for his efforts to reduce governmental waste, received a reprimand from Col. Burnett.

Dr. Connor and his attorney went to the Civilian Personnel Office on February 5, 1976. There they viewed Dr. Connor's personnel file and noted nothing derogatory therein. However, Mr. William J. Davis at the Civilian Personnel Office indicated that he had a copy of Col. Burnett's private files which were not available to either Dr. Connor or his attorney.

On February 9, 1976, Dr. Connor received a ninety (90) day letter of warning. He was later told that this was not an official letter and would not be placed in his file. Furthermore, he was not allowed to contest the letter in spite of the false information contained therein.

A confidential complaint was then made by Dr. Connor to the Inspector General's Office regarding certain aspects of the J-SIIDS program. This confidence was violated in that the complaint was reported to improper persons.

Also, in February of 1976, specifically, on February 23, 1976, Dr. Connor through his attorney filed a grievance. The basis *inter alia* for this grievance was the fact that the employees or agents of the Department of the Army were maintaining improper records on Dr. Connor and disclosing this information improperly. Dr. Connor again requested an amendment of the records and removal of all derogatory information, all of which was denied. No hearing in the sense of there being an accuser, an accused, confrontation of witnesses, etc. was held

despite Army regulations to the contrary. An investigation was, however, conducted. During this investigation, Dr. Connor once more requested hearings and removal or amendment of his records, all to no avail. Neither the Plaintiff nor his attorney was permitted to interview the witnesses who were consulted by the government as a part of this investigation. Finally, Dr. Connor's grievance was denied in August of 1976. This decision was final and Dr. Connor was not allowed to request further review of this particular grievance within the Department of the Army.

Dr. Connor subsequently received his thirty (30) day letter of termination in July of 1976 and was separated in August of 1976. Thereafter, on June 13, 1977, Dr. Connor requested an administrative hearing to investigate alleged Privacy Act violations. By letter dated June 17, 1977, Col. David Rarick, Staff Judge Advocate, indicated that there were no such administrative hearings provided at the agency level.

Dr. Connor's second complaint was filed on October 11, 1977.

ARGUMENT

The Court of Appeals for the Sixth Circuit, while affirming the District Court's decision in a perfunctory manner, expressly sanctioned the rationale employed by the District Court in reaching its decision. That rationale consisted of two parts, the first being that Dr. Connor had failed to exhaust available prescribed administrative remedies and the second being that in any event, the disclosure of the information relevant to Dr. Connor was proper on a "need to know" basis. The Petitioner herein believes that for the reasons stated below this rationale is improper, is in conflict with other decisions of the courts

of appeal and of this Court, presents an important Federal question which this Court should decide, and so far sanctions a departure by the District Court from the usual judicial proceeding as to require the exercise of this Court's supervisory powers.

THE PRIVACY ACT OF 1974 AND ITS LEGISLATIVE HISTORY DO NOT REQUIRE THE EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT WHERE THE INFORMATION SOUGHT TO BE CORRECTED OR AMENDED IS CONTAINED IN A SEPARATE, SECRET, PRIVATE FILE WHOSE PRECISE WHEREABOUTS AND CONTENTS ARE UNAVAILABLE AND UNKNOWN TO THE PETITIONER DESPITE REPEATED EFFORTS ON HIS PART TO GAIN ACCESS TO THEM, WHERE RESORT TO ADMINISTRATIVE REMEDIES WOULD BE FUTILE, WHERE THE EXISTENCE AND EFFECT OF CERTAIN ADMINISTRATIVE REMEDIES WERE NOT MADE KNOWN TO THE PETITIONER, AND WHERE, IN FACT, THE PETITIONER WAS INFORMED BY THE RESPONDENTS THAT NO ADMINISTRATIVE REMEDIES EXISTED.

At the outset Dr. Connor contends that he did in fact exhaust the available prescribed administrative remedies, if any existed. One of his contentions before the hearing examiner on his grievance filed in February of 1976 was the improper maintenance of records containing derogatory information about him and the unauthorized disclosure of such. The hearing examiner found the file's maintenance and its use to be legitimate. His decision in August of 1976 was final, with no further review being available within the Department of the Army. Thus, Dr. Connor did in fact exhaust the available prescribed administrative remedies, if any existed. Assuming *arguendo* that this Court does not so conclude, Dr. Connor respectfully submits that he was not required to

exhaust such remedies before proceeding to federal court under the circumstances set forth below.

Dr. Connor and his attorney attempted to gain access to the information pursuant to 5 U.S.C. §552(a)(d) but were denied that right on several occasions—one of which involved the then commanding general of Fort Knox. Additionally, they were told by employees of the United States that such information did not exist. Thus a civil action was permissible without regard to the exhaustion of administrative remedies since the Government had refused to comply with 5 U.S.C. §552(a)(d)(1). See 5 U.S.C. §552(a)(g)(1).

Moreover, the facts in this case indicate that resort to the available prescribed administrative remedies would have been futile. The records containing the adverse information were contained not in Dr. Connor's personnel file but in a separate, secret, private file belonging to Col. Burnett, Dr. Connor's supervisor, which neither Dr. Connor nor his attorney was allowed to see.

Dr. Connor was aware of certain derogatory information contained in certain letters which were in the possession of Col. Burnett. However, he was not aware of the precise whereabouts of the file nor was he aware of the file's precise contents. Thus, any request on his part to amend or correct records which were unavailable or unknown to him would have been patently futile.

Generally, as this Court is well aware, no one is entitled to judicial relief for a real or imagined injury unless and until available prescribed administrative remedies have been exhausted. See, *e.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This general rule is subject to certain justifiable exceptions. When it is patently obvious that resort to the available prescribed administrative remedies would be futile, the

general rule does not serve its purpose and, therefore, is not applicable. See *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 330-331 (1969); *Churchwell v. United States*, 414 F. Supp. 299 (N.D.S.D. 1976), affm'd on other grounds, 545 F.2d 59 (8th Cir. 1976). Moreover, the general rule is not applicable in circumstances where the individual concerned is not informed of, among other things, the procedures necessary to effectuate the available prescribed administrative remedies. See *Harper v. Kobelinski*, 589 F.2d 721 (D.C. Cir. 1978); *Hall v. United States Civil Service Commission*, 533 F.2d 695 (D.C. Cir. 1976).

In *Churchwell v. U.S., supra*, a probationary federal employee was terminated two months before her one year probationary period ended. The Civil Service Commission Regulations provided her with an administrative appeal if her termination was based on one of several enumerated reasons. Her termination was not, however, based on any of these reasons.

The District Court considered the question of whether her failure to exhaust these available administrative remedies precluded her from proceeding with her lawsuit. The Court held that the administrative appeal process would be totally frivolous and its application pointless under the circumstances.

In a similar case, Mr. Justice Black speaking for this Court in *Glover v. St. Louis-S.F.R. Co., supra*, opined that the application of futile administrative remedies should not forestall a legitimate lawsuit. In that case eight blacks and five whites brought suit against the railroad and their bargaining agent alleging that a "tacit understanding" and "a subrosa agreement" existed between these two Defendants which effectively prevented the Plaintiffs from gaining work. A Motion to Dismiss for

failure to exhaust administrative remedies was granted. The Plaintiffs then amended their complaint to add in substance the allegation that the administrative procedures available would be useless, frustrating and completely futile. The District Court dismissed the complaint again for failure to exhaust administrative remedies and the Fifth Circuit Court of Appeals affirmed. The Supreme Court reversed and remanded for a trial noting that all administrative remedies are not effective, particularly, as in that case and as in the case at bar, where the remedies are *devised* and *controlled by the adversary party*. See, *e.g., Vaca v. Sipes,* 386 U.S. 171, 184-185 (1967).

In the case at bar, it defies common sense to believe that the use of any administrative remedy devised, controlled and administered by the very people against whom the individual had his complaint would amount to anything other than an exercise in futility. One must turn his back on reality in order to believe that the Department of the Army in this case would cooperate with the Petitioner in view of their prior pattern and practice of noncooperation and "stonewalling". Thus, the District Court's holding as subsequently affirmed by the Court of Appeals to the effect that the case should be dismissed for failure to exhaust administrative remedies flies in the fact of justice and fair play and is diametrically opposed to the holdings of this Court in *Glover v. St. Louis-S.F.R. Co., supra,* and the Court of Appeals for the Eighth Circuit and the United States District Court for the Northern District of South Dakota in *Churchwell v. United States, supra.*

The Court of Appeals for the District of Columbia Circuit has held that the exhaustion requirement is not a prerequisite where the individual is not informed of the

procedures necessary to effectuate the administrative remedies and, therefore, should not be penalized for bypassing it.

In *Harper v. Kobelinski, supra,* an employee of the Small Business Administration brought suit against his employer under the Privacy Act to prevent the allegedly unauthorized disclosure and use of a confidential file maintained by the SBA. The District Court dismissed the case for failure to exhaust administrative remedies. The District of Columbia Circuit Court of Appeals reversed holding that Harper was not advised nor was he aware of the administrative review procedure available to him and, therefore, should not be penalized for bypassing it. See also, *Hall v. United States Civil Service Commission, supra.*

Harper was entitled to ask that the record pertaining to him be amended. This he did, but his request was denied. He was not, thereafter or at any time, advised of his appellate rights.

In the instant case, Col. David Rarick, Staff Judge Advocate of Fort Knox, Kentucky, advised the Petitioner's then counsel of record by letter dated June 17, 1977, of the following:

> The Army Regulations and Civil Service Commission Regulations do not provide for an administrative hearing to resolve Privacy Act disputes at the agency level. However, both agencies have promulgated regulations pursuant to the Privacy Act providing for access and amendment to an individual's file. The procedures to be followed are found at 32 CFR Part 5 for Army Files and 32 CFR Part 297 for Civil Service Files. Depending on what files you seek to examine, either the Army Regulations or the Civil Service Regulations will apply.

Clearly, the Staff Judge Advocate, a representative of the United States, indicated that there was *no* administrative hearing available at the agency level by this letter. He did go on to say that there were procedures which could be utilized to secure Army Files or Civil Service Files. However, Dr. Connor was seeking information contained in private files. Moreover, he had earlier attempted on several occasions to gain access to the pertinent files but had been denied this right. Furthermore, by this time, namely, June of 1977, any use of administrative remedies vis-a-vis the Privacy Act had become moot since the derogatory information had long since been released and the damage done. The sanctioning of this scheme by the Court of Appeals for the Sixth Circuit and the District Court herein is in contradistinction to the holdings of the Court of Appeals for the District of Columbia Circuit as set forth hereinabove.

This Court has, on numerous occasions, indicated that the legislative history of a particular statute, and thereby its purpose, may be considered in determining its meaning. This is true even if the words of the statute appear to be unambiguous. *See Harrison v. Northern Trust Company*, 317 U.S. 476,479 (1943). This is particularly true where the results of the statute's apparent meaning are futile or at variance with the policy or purpose of the legislation. *See United States v. American Trucking Association*, 310 U.S. 534, 542-543 (1940). Furthermore, the committee report regarding the statute may also be considered as representing the collective understanding of those individuals involved in drafting and studying the proposed legislation. See *Zuber v. Allen*, 396 U.S. 168,186 (1969). Moreover, the Committee Report of the legislative body in which the statute originates should be accorded greater weight than that of the other legislative body. See *Steiner v. Mitchell*, 350 U.S. 247,254 (1956).

Thus, finally and perhaps most importantly, one must consider the Act's legislative history to determine if, in fact, administrative remedies are required to be exhausted prior to filing a civil action. Considering Senate Report Number 93-724, which was the first report concerning a Privacy Act, and the other relevant legislative history, one quickly discerns that the initial concept provided a civil remedy *without regard* to whether the aggrieved party had exhausted administrative remedies. Specifically on page 35 of that report, [Legislative History of The Privacy Act of 1974, S. 3418 (Public Law 93-579), p. 570 (Sept. 1976)], the employee's remedies are discussed. The employee is given the right to pursue a remedy through agency procedures, but the fact that he does not choose to avail himself of these procedures does not prevent him from exercising other remedies. The report goes further on that same page and states that the employee does not need to exhaust any administrative remedies.

The report on page 45 [Legislative History of The Privacy Act of 1974, S. 3418 (Public Law 93-579), p. 580 (Sept. 1976)] further enlightens one on this point. There in the Section-by-Section analysis the following statement is made concerning civil remedies:

> "Moreover, the suit may be maintained without regard to whether or not the aggrieved party has exhausted available administrative remedies."

Furthermore, on pages 371 and 372 of the Legislative History of The Privacy Act of 1974, the original Senate bill, #3418, provides that "[a] civil action against the United States . . . *shall* be the *exclusive* remedy for the wrongful action or omission of any officer or employee." Thus, it is abundantly clear from the legislative history that a civil action was intended to be the aggrieved

party's remedy without regard to the exhaustion *vel non* of administrative remedies. The apparent conflicts between the analysis offered herein and that of the Court of Appeals is a substantial federal question which could be and should be laid to rest by definitive guidelines from this Court.

THE SUBMISSION OF IMPROPER OR FALSE PLEADINGS BY THE RESPONDENTS EFFECTIVELY DENYING THE PETITIONER A *TIMELY* OPPORTUNITY TO CORRECT THE RECORD SHOULD ENTITLE THE PETITIONER TO A DECREE.

In both the original Answer filed by the Respondents in the initial District Court case and in their Motion to Dismiss or, in the Alternative, for a Summary Judgment and in opposition to the Plaintiff's Motion for Partial Summary Judgment in the second case, the statement is made by the Respondents that the Petitioner had failed to exhaust available administrative remedies. This is true notwithstanding statements made by the Staff Judge Advocate at Fort Knox by letter dated June 17, 1977, to the effect that there were no available administrative hearings at that level.

Similarly, in the original Answer the Respondents denied that Col. Burnett was keeping a separate secret or private file on Dr. Connor. This position was maintained throughout the initial case and appeal, though later evidence showed without question that this was a gross misstatement of the facts.

The question posed by these revelations is whether this Court should and will sanction such actions where their effect is to thwart discovery attempts on behalf of a litigant and to effectively discount the timeliness of any action taken or which could have been taken by or on

behalf of that litigant pursuant to the Privacy Act of 1974. Stated otherwise, the improper (at best) or false (at worst) pleadings effectively denied the Petitioner the opportunity to *discover, face* and *correct* existing derogatory information in a *timely* fashion. By the time the information surfaced, it was too late to "unfry the egg".

The heart of Dr. Connor's complaint from its genesis has been that knowingly false and malicious conduct has occurred. If Dr. Connor had been given a chance to correct this in a timely fashion, perhaps he could have. However, the continuous pattern and practice of thwarting discovery[1] by the Respondents foreclosed his (Dr. Connor's) opportunity to correct the false information and conduct. Clearly, General DePuy's statement that "Honesty is out—cleverness and cunning are in" was personified in Dr. Connor's case.

Moreover, the pleadings submitted by the Government amount in large part to their interpretation of the Privacy Act. This is inconsistent with Section 6 of the Act (as it existed at that time). That section provided that the Office of Management and Budget should develop guidelines and regulations for the implementation of the Act and continually assist and oversee this implementation. What does this mean? Does it contemplate the Office of Management and Budget interpreting the Act for all agencies? If it does, the Government should never have submitted pleadings interpreting the Act.[2] If it does not, it is useless.

This Court in *Kennedy v. Creswell*, 101 U.S. 641 (1880), a time-honored opinion, considered among other

---

[1]This caused Dr. Connor to request at one point that a Special Prosecutor be appointed to investigate the entire matter.

[2]This is another matter of apparent conflict or inconsistency which this Court should resolve.

things the effects of a false pleading filed by the Executor of an estate in response to a bill in equity filed by several creditors of that same estate. Mr. Justice Bradley, speaking for the Court, spoke to the effects or results of such an action. In doing so, he quoted Sir Thomas Plumer as follows:

> " 'Supposing a plea to be correct in form, but proved false, it seems to be conceived that the course at the hearing is to take it up just as if there was no answer. This is not correct. *Upon a plea found false the Plaintiff is entitled to a decree*; and if a discovery is wanted, the Defendant is ordered to be examined upon interrogatories.' *Wood v. Strickland*, 2 VES. & B., 150." [Emphasis added]. 101 U.S. at 644.

Mr. Justice Bradley also drew on Chancellor Walworth's wisdom for guidance under the circumstances. He quoted Chancellor Walworth thusly:

> " 'Where a plea in bar to the whole bill is put in, if the Complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If, at the hearing, the plea is found to be true, the bill must be dismissed. But if the plea is untrue, the Complainant will be entitled to a decree against the Defendant in the same manner as if the several matters charged in the bill had been confessed or admitted. If a discovery is necessary to enable the Complainant to obtain the relief sought for by his bill, the Defendant cannot evade answering by putting in a plea which turns out to be false. . .' *Dows v. McMichael*, 2 page, 345." 101 U.S. at 644-645.

Thus, since the improper or false pleadings effectively prevented the Petitioner from correcting the situation until it was too late to prevent the disclosure of the

derogatory information, he should be entitled to a decree. Nothing else will or could correct the damage done.

In this context, this case cries out for the exercise of this Court's supervisory powers. To do otherwise where improper or false pleadings have effectively deprived this litigant of the protection of the Privacy Act would in effect emasculate the provisions of the Privacy Act and would allow the wrongdoer (the Government) to benefit from their own wrongdoings (i.e. their false pleadings). Once the true facts had been admitted or revealed by the Respondents, a decree for the Petitioner was in order pursuant to his Motion for Partial Summary Judgment. Certainly no Summary Judgment against him was justifiable.

AN AGENCY OF THE UNITED STATES MAY NOT PROVIDE *KNOWINGLY FALSE* AND DEROGATORY INFORMATION ABOUT AN INDIVIDUAL WITHOUT THE PRIOR WRITTEN CONSENT OF, OR A PRIOR WRITTEN REQUEST BY, THE INDIVIDUAL TO WHOM THE INFORMATION PERTAINS, PARTICULARLY IN VIEW OF THE LEGISLATIVE HISTORY OF THE ACT.

The undisputed facts as indicated herein show that derogatory information concerning Dr. Connor was released to prospective employers at Fort Rucker, Alabama, and Fort Leavenworth, Kansas, by Col. Burnett. This was done without a written request by, or without the prior written consent of, Dr. Connor as required by 5 U.S.C. §522a(b). Additionally, the disclosure of this information was not required by either a court order or by the Freedom of Information Act. The sole basis for the release of this information was simply that the person receiving it had a "need to know". See 5 U.S.C. §522a(b)(1).

Regardless of whether or not the other individual's need to know existed, the information should not have been disclosed. First of all, there was no written request for such by Dr. Connor nor did Dr. Connor give his written consent to such a disclosure. Secondly, as set forth in the legislative history relating to the Privacy Act,[3]

> "[The Privacy Act] is designed to halt the internal blacklisting that frequently goes on in agencies and on Federal installations on persons who do not comply with the organizational norms and standards for some reason, . . . ;
>
> "It is designed to help prevent the easy exchange of data about the same individual between regional managers of different programs within a bureau or department and the consequent informal or inadvertent administrative integration of data for purposes of making a governmental decision about that person. . . ."

See Legislative History of The Privacy Act of 1974, S. 3418 (Public Law 93-579), p. 204 (Sept. 1976). Thus, the subject disclosure is exactly the type the privacy act was designed to prevent. Finally, the legislative history on page 205 indicates that agencies should maintain a list of those persons and agencies authorized to have regular access to personal information in the file. This was not done.

Whether or not the release was proper, summary judgment should not have been granted on this point. As

---

[3]The legislative history should be considered for reasons set forth in Section I of the Argument.

this court is well aware, summary judgment is a drastic remedy which is not designed to deprive a litigant of his day in court unless there are absolutely no facts lending credence to his position. When such a motion is filed, the court must construe the facts in a light most favorable to the opposing party and resolve any differences in his favor. Rule 56, Federal Rules of Civil Procedure; *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Construing the instant facts with these principles in mind, it is apparent that there was a factual question which existed vis-a-vis the receiving party's "need to know" in this case. This should have been resolved by trial.

The propositions stated herein with regard to summary judgment are nothing esoteric or new to this Honorable Court. On the contrary, they are basic legal principles enunciated many times by this Court and by all the courts of appeal. The instant decision is in conflict with these basic legal principles as set forth by this Court and by the courts of appeal. Furthermore, the decision so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in the ordering of a trial.

CONCLUSION

At first glance this may appear to be a simple summary judgment case. However, on reflection and in-depth analysis, we believe this Court will perceive the deeper, more far reaching implications of this case.

The primary source of information concerning misconduct and corruption in Government is oftentimes Government employees. The Privacy Act was designed to prevent the blacklisting and coercion of such employees. In order to prevent such, the Privacy Act must have

parameters and guidelines for its use which only this Court can establish. In the final analysis, therefore, this case concerns the Privacy Act, its integrity and its future vitality. We respectfully submit, and strenuously urge, this Court to grant this Petition and review the matter for the reasons set forth hereinabove.

Respectfully submitted,

ROBERT T. MEADOWS, III
P.O. Drawer 712
Auburn, Alabama 36830
(205) 821-2800
Attorney for Petitioner.

Of Counsel:
HARPER & MEADOWS
233 East Magnolia Avenue
Auburn, Alabama 36830

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ANDREW C. CONNOR,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al,

Defendant.

CIVIL ACTIONS
No. C 75-0431 L(A)
No. C 77-0487 L(A)

SUMMARY JUDGMENT

The defendant, having moved this Court to dismiss or, in the alternative, for summary judgment and the plaintiff, having moved for partial summary judgment, and the Court, having entered its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the motion of the defendant for summary judgment be and it is hereby sustained, and plaintiff's motion for partial summary judgment be and it is hereby denied.

This is a final and appealable judgment and there is no just cause for delay.

Dated 11-9-79

Charles M. Allen
Chief Judge

cc: Counsel of Record

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ANDREW C. CONNOR,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al,

Defendants.

CIVIL ACTIONS
No. C 75-0431 L(A)
No. C 77-0487 L(A)

MEMORANDUM OPINION

These two consolidated actions are submitted to the Court on the motion of the defendants to dismiss, or, in the alternative, for summary judgment, and on plaintiff's motion for partial summary judgment. The first action filed by plaintiff was dismissed by the late Chief Judge Rhodes Bratcher on March 8, 1977, for failure of plaintiff to exhaust his administrative remedies.

Plaintiff appealed that decision, and while that appeal was pending, filed a second complaint, Civil Action C 77-0487 L(A), alleging that his administrative remedies were exhausted. The United States Court of Appeals for the Sixth Circuit then remanded the appeal to this Court for the purpose of consolidating it with the second complaint.

Plaintiff, who seeks damages in the amount of $6,000,000, was a civilian employee at the United States Armor Center, Fort Knox, Kentucky, from March 13, 1974 to August 11, 1976, at which time he was separated because of alleged inefficiency. Plaintiff was employed as

an Operations Research Analyst at the pay grade of GS-11. His duties included analyses of functions pertinent to cost research and information systems, weapon systems and force estimates activities.

While employed at Fort Knox in the Directorate of Combat Developments, plaintiff was sent on temporary duty to Fort Benning, Georgia to work as a project officer on a study group. He was at Fort Benning from January 10, 1975 to June 30, 1975.

Upon plaintiff's return to Fort Knox, his supervisor there, Colonel Clark Burnett, Chief of the Studies Division Directorate of Combat Developments, requested an evaluation of plaintiff's performance while at Fort Benning. This request was made in order to prepare an official evaluation. The information which he requested was furnished in the form of letters with endorsements which were critical of plaintiff. Copies of these letters were furnished to plaintiff.

On July 31, 1975, Col. Burnett discussed the uncomplimentary nature of the Fort Benning letters with plaintiff and personally handed him copies of the letters. The cover letter given to plaintiff stated that copies of the Fort Benning letters were being forwarded to the Civilian Personnel Office (CPO). Col. Burnett kept copies of the letters in an unmarked manila folder located in his safe at his government office. The letters were not indexed to any identifier assigned to the plaintiff.

The next day another discussion was had between plaintiff and Col. Burnett concerning the Fort Benning evaluations. The Fort Benning evaluations were not placed in plaintiff's personnel folder by the CPO which returned them to Col. Burnett. The documents were never placed in plaintiff's official personnel file, and he was made aware that they were not in that file.

In November, 1975, Col. Burnett furnished a personal evaluation of plaintiff to supervisory personnel at Fort Rucker and Fort Leavenworth concerning plaintiff. Plaintiff was exploring job opportunities at those installations. Col. Burnett discussed the unfavorable letters received from Fort Benning. His affidavit states that his discussion was based on his recollection of what was in the letters, but that, at any rate, he referred the supervisors to plaintiff's Fort Benning supervisor for more information.

On December 8, 1975, Col. Burnett formerly requested CPO to terminate plaintiff's employment. Five weeks later, plaintiff filed the first of the consolidated complaints which are at issue in this action. On February 7, 1976, plaintiff was given his official 90-day notice of termination, and subsequent to that time was granted complete access to his records, including the evaluations. At no time did he make any effort with the authorities at Fort Knox or with the Army to correct or amend the Fort Benning letters.

The Privacy Act of 1974, 5 U.S.C. Sec. 552a, et seq. is a detailed and complex Act, one of those primary purposes is to protect individuals from adverse action based on secret records. To effectuate that broad purpose, subsection (d) provides a right of access for each individual to information pertaining to himself which is contained in a system of records of a federal agency, and further provides that the agency must permit him to request amendment of a record pertaining to him. That subsection also provides that the agency, after receiving such a request, must amend any portion of the record which the individual believes is not correct, or refuse to do so, together with a statement of its reasons for refusing the amendment, as well as a statement of the procedures established by the agency to afford a review of the refusal.

That subsection also permits the individual who disagrees with the refusal of the agency to amend its record to request a review of the refusal, and also requires the agency, within 30 days, to make a review of the request and make a final determination. If the agency then refuses to amend the record, it must permit the individual to file a concise statement setting forth the reasons for his disagreement with the refusal, and the agency must also notify him of the provisions for judicial review of the refusing officer's determination.

The record in this action plainly reveals that plaintiff has at no time endeavored to comply with the provisions of the statute which, in its elaborate and detailed manner, more than adequately protects the rights of government personnel in the matter of having their records accurately kept. Plaintiff complains that no opportunity was given to him to correct or counter the information, nor any effort made to determine the correctness or validity of the information which was disclosed by the agency. The record reveals that plaintiff first had knowledge of the Fort Benning letters in July, 1975. In fact, he had copies of those letters. As late as February, 1976, he was granted access to the records, including the Fort Benning evaluations, and made no formal attempt to amend the letters in accordance with the statute. As late as June 4, 1976, plaintiff was still in the employment of the Army and was not terminated until August 11, 1976.

Plaintiff complains bitterly because the Fort Benning letters were not in his official CPO file. Since these letters were unfavorable to him, the complaint may be subject to some skepticism. The defendants argue that the letters were not records within the meaning of the Privacy Act. Title 5 U.S.C. Sec. 552a(a)(4) and (5) contain the following definitions:

"(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

"(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;"

Title 5 U.S.C. Sec. 552a(b) and (b)(1) provide as follows:

"(b) *Conditions of disclosure.* No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be "(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;"

While the defendants contend that the letters of evaluation constitute private papers kept by Col. Burnett for his own use in evaluating the performance of plaintiff and other personnel, it seems to the Court that, although this argument may be technically correct, it certainly would not be appropriate in many circumstances. As was admitted by Col. Burnett, he expected that these letters would be placed in the plaintiff's personnel file, and his opinion and the CPO's opinion that these letters were not

official records would not suffice to protect the agency in situations where the letters were kept secret from the employee and were the basis of unfavorable action to him.

Here, the letters were not kept secret from the employee and, although they may well have formed the basis, in substantial part, for his termination, they were letters which could properly be disclosed under Sec. 552(a)(b)(1), *supra.*

It is obvious that both Col. Burnett and the supervisory personnel at Fort Rucker and Fort Leavenworth were officers and employees of the Army, the agency by which plaintiff was employed, who had a need for these letters in the performance of their duties. Plaintiff's contention that each of the four Forts mentioned in this opinion are separate agencies is without merit. It is obvious that plaintiff was employed by the United States Army, which is an agency of the United States Government, and that Fort Knox and the other Forts are merely the localities where the Army, as an agency of the Government, carries on its operations.

In conclusion, we hold that defendants are entitled to summary judgment and the plaintiff's motion for partial summary judgment should be denied. A judgment in accordance with this opinion has been entered this day.

APPENDIX C

Filed
JUL 31, 1980

No. 79-3738

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW C. CONNOR,

Plaintiff-Appellant,

v. ORDER

UNITED STATES OF AMERICA and
DEPARTMENT OF ARMY, an agency
of the United States,

Defendants-Appellees.

Before: EDWARDS, Chief Judge, KENNEDY, Circuit Judge, and PECK, Senior Circuit Judge.

On receipt and consideration of the decision of the United States District Court for the Western District of Kentucky granting summary judgment for the United States in two consolidated civil actions filed by a former employee of the United States, alleging a violation of the Privacy Act of 1974, 5 U.S.C. §552(a) (1976); and

After review of the record on appeal, finding no merit to the appeal,

The judgment of the District Court dismissing these two cases is hereby affirmed for the reasons set forth in the memorandum opinion of Chief United States District Judge Charles M. Allen, entered November 9, 1979.

Entered by order of the Court

/s/ Sara L. Altman
Deputy Clerk

APPENDIX D

Filed
OCT 8, 1980

No. 79-3738

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW C. CONNOR,

Plaintiff-Appellant,

v. ORDER

UNITED STATES OF AMERICA
DEPARTMENT OF ARMY, AGENCY
OF UNITED STATES OF AMERICA,

Defendants-Appellees.

Before: EDWARDS, Chief Judge, KENNEDY, Circuit Judge, and PECK, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the court

/s/ John P. Hehman

Clerk

APPENDIX E

[SEAL]

Public Law 93-579
93rd Congress, S. 3418
December 31, 1974

AN ACT

To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Act of 1974".

SEC. 2. (a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent minuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in

those cases where there is an important public policy need for such exemptions as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

SEC. 3. Title 5, United States Code, is amended by adding after section 552 the following new section:

"**§ 552a. Records maintained on individuals**

"(a) DEFINITIONS.—For purposes of this section—

"(1) the term 'agency' means agency as defined in section 552(e) of this title;

"(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;

"(3) the term 'maintain" includes maintain, collect, use, or disseminate;

"(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

"(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

"(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

"(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent, the individual to whom the record pertains, unless disclosure of the record would be—

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or ciminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, and joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES.–Each agency, with respect to each system of records under its control, shall–

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting–

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS.–Each agency that maintains a system of records shall–

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him

and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

"(2) permit the individual to request amendment of a record pertaining to him and—

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either—

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day

period; and if, after his review, the reviewing official also refused to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse deter-

minations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual–

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include–

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is

maintained or unless pertin to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

"(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

"(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual to medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g)(1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

"(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reason-

ably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

> "(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> "(B) the costs of the action together with reasonable attorney fees as determined by the court.

"(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which

the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

"(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

* * * * *

SEC. 6. The Office of Management and Budget shall—

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

FILED
APR 20 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1274

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANDREW C. CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA AND
THE DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Beller v. *Middendorf*, 632 F. 2d 788, petition for cert. pending, No. 80-139 (filed Feb. 17, 1981) 6

Harper v. *Kobelinski*, 589 F. 2d 721 4

McKart v. *United States*, 395 U.S. 185 3

White v. *United States Civil Service Comm'n*, 589 F. 2d 713, cert. denied, 444 U.S. 830 5

Statute:

Privacy Act of 1974, 5 U.S.C. 552a 1

5 U.S.C. 552a(b) 5

5 U.S.C. 552a(b)(1) 5-6

5 U.S.C. 552a(d)(2)-(d)(4) 3-4

5 U.S.C. 552a(g)(1)(C) 4, 5

5 U.S.C. 552a(g)(4) 4, 5

Miscellaneous:

S. Rep. No. 93-724, 93d Cong., 2d Sess. (1974) 3-4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1274

ANDREW C. CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA AND
THE DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the dismissal of two consolidated cases alleging violations of his rights under the Privacy Act of 1974, 5 U.S.C. 552a. In essence, he contends that the Army maintained an informal file on him from which false information was disseminated without his prior written consent and without allowing him to correct the information.

1. Petitioner was a civilian employee at the United States Army Armored Center, Fort Knox, Kentucky, from March 13, 1974, to August 11, 1976, at which time he was separated for inefficiency (Pet. App. 2a). While employed at Fort Knox, he was sent on temporary duty to Fort Benning, Georgia, from January 10, 1975, to June 30, 1975 (*id.* at 3a). Upon petitioner's return, his supervisor at Fort Knox, Col. Clark Burnett, requested an evaluation of petitioner's performance while at Fort Benning in order to prepare an official

evaluation. Col. Burnett received the requested information in the form of letters containing unfavorable statements concerning petitioner (*id.* at 3a; Pet. 8). Copies of these letters were furnished to petitioner on July 31, 1975 (Pet. App. 3a). Although copies of these letters were forwarded to the Civilian Personnel Office (CPO), they were not placed in petitioner's official personnel file but instead were returned to his supervisor. Col. Burnett kept copies of the letters in a unmarked folder in his office safe, but they were not indexed to any identifier assigned to petitioner (*ibid.*).

In November 1975, Col. Burnett provided a personal evaluation of petitioner to supervisory personnel at Fort Rucker and Fort Leavenworth, where petitioner was exploring job opportunities. The discussion included Col. Burnett's recollection of the contents of the Fort Benning letters (Pet. App. 4a). On December 8, 1975, Col. Burnett formally recommended to the CPO that petitioner's employment be terminated. Petitioner was given his official 90-day notice on February 7, 1976, and was subsequently granted access to his records, including the Fort Benning evaluations (*ibid.*). Petitioner was terminated for inefficiency on August 11, 1976, and the Fort Benning evaluation letters became part of his adverse action file (C.A. App. 98).[1] When he appealed his termination, these letters became part of his appeals file (*ibid.*). At no time did petitioner make any effort to correct or amend these letters (Pet. App. 4a).

2. This petition involves two consolidated actions, filed in the United States District Court for the Western District of Kentucky, alleging violations of the Privacy Act and seeking $6 million in damages (Pet. App. 2a). The first action was dismissed for failure to exhaust administrative remedies. Petitioner appealed and, while the appeal was

---

[1]"C.A. App." refers to the appendix filed in the court of appeals.

pending, filed a second suit alleging that he had exhausted his administrative remedies. The first case was then remanded by the court of appeals to the district court, where it was consolidated with the second complaint (*ibid.*).

The district court granted the government's motion for summary judgment, holding that petitioner had not exhausted his administrative remedies and that any disclosure of the Fort Benning letters had been properly made to persons who had a need for the records (Pet. App. 4a-7a). The court of appeals affirmed "for the reasons set forth in the [district court's] memorandum opinion" (*id.* at 8a).

3. Petitioner's Privacy Act claims relate essentially to two categories of alleged agency misconduct: that the Army maintained inaccurate records on him (Pet. 14-24) and that information about his job performance in those records was improperly disclosed (Pet. 24-26). The district court correctly entered summary judgment against petitioner with regard to both claims. Its decision, summarily affirmed by the court of appeals, does not conflict with the decision of any other court. Accordingly, this case does not warrant further review.

a. As the district court correctly held (Pet. App. 5a-6a), petitioner's claim with respect to alleged maintenance of inaccurate records is barred by his failure to exhaust his administrative remedies. See *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969).[2] Subsections (d)(2)-(d)(4) of the

---

[2]Petitioner's contention (Pet. 20) that the legislative history of the Privacy Act reveals that Congress did not intend that complainants be required to exhaust administrative remedies is predicated on a report that concerns a bill totally different from the one ultimately enacted as the Privacy Act. The report's statements concerning direct court suits refer to grievances respecting such matters as compelled psychological testing of employees and agency questionnaires demanding personal information; it was proposed that a special Board of Employee Rights be established to hear such grievances but that an alternative judicial remedy be available without prior resort to the Board. S. Rep. No.

Act, 5 U.S.C. 552a(d)(2)-(d)(4), set forth detailed procedures for seeking amendment of an allegedly inaccurate record. If petitioner had followed the proper procedures, the agency might have agreed to make the specific amendments requested; and if it had refused to amend in response to specific requests, the district court would have had some basis for determining whether the agency had willfully failed to maintain accurate records which served as the basis for an adverse determination against petitioner. See 5 U.S.C. 552a(g)(1)(C), (g)(4). Instead, as the district court observed (Pet. App. 5a), petitioner "has at no time endeavored to comply with the provisions of the statute which, in its elaborate and detailed manner, more than adequately protects the rights of government personnel in the matter of having their records accurately kept."

Petitioner has suggested no adequate reason for not applying the exhaustion doctrine to his case. He knows which records he wished to correct because they were shown to him (Pet. App. 5a; Pet. 8, 9). Unlike the plaintiff in *Harper* v. *Kobelinski*, 589 F. 2d 721 (D.C. Cir. 1978), upon which he relies (Pet. 16, 18), petitioner was specifically informed of agency regulations promulgated in accordance with the record-amendment provisions of the Act (Pet. 18).[3] Petitioner's contention that it would be futile to follow those

---

93-724, 93d Cong., 2d Sess. 1-3, 35, 45 (1974). This obviously has no bearing on the question whether an employee must request correction of records according to the established administrative procedures of the Privacy Act before seeking judicial relief under that statute on a claim that the records are inaccurate.

[3]The Act requires agencies to afford procedures consisting of written submissions and responses but does not require evidentiary hearings. 5 U.S.C. 552a(d)(2)-(d)(4). Thus, when a Fort Knox legal officer informed petitioner that no "administrative hearing" was available with respect to his complaint regarding inaccurate records (see Pet. 18-19), he was correctly describing Privacy Act procedures, not informing petitioner that the agency would refuse to accord him the Act's administrative remedies. Petitioner's reference to a hearing examiner's decision

procedures because the administrative mechanism is controlled by the offending agency proves too much, since this would permit any person with a Privacy Act grievance against his employers to avoid pursuing his administrative remedies. Finally, petitioner's contention (Pet. 21-24) that it is now too late for amendment of his records to be of value to him in avoiding his termination is not grounds for making this case an exception to the exhaustion doctrine. As noted above, petitioner's failure to seek specific amendments of his allegedly inaccurate records has left the district court with no adequate basis for determining whether the agency committed a willful violation of 5 U.S.C. 552a(g)(1)(C). See 5 U.S.C. 552a(g)(4).

b. Although the Privacy Act generally bars disclosure of any covered records unless the individual to whom the record pertains gives his prior written consent (5 U.S.C. 552a(b)), this requirement is subject to a number of exceptions. The district court (Pet. App. 7a) correctly relied on one of those exceptions when it rejected petitioner's contention (Pet. 24-26) that his Fort Knox supervisor violated the Act by disclosing the derogatory information about his job performance in the Fort Benning letters to officers at other Army posts who were considering hiring him. Assuming the letters were "records" for the purposes of the Privacy Act, the officers at the other posts were "officers * * * of the agency [the Army] which maintains the record who have a need for the record in the performance of their duties" and thus persons to whom the information could be disclosed without petitioner's prior written consent. 5 U.S.C.

(Pet. 14) is to the grievance proceeding respecting his 90-day notice of termination (C.A. App. 155-214). We note that in that proceeding and in a grievance proceeding respecting his termination, petitioner was free to challenge the propriety of the Army's reliance on his records in connection with the termination decision. Cf. *White* v. *United States Civil Service Comm'n*, 589 F. 2d 713 (D.C. Cir. 1978), cert. denied, 444 U.S. 830 (1979).

552a(b)(1). See *Beller* v. *Middendorf*, 632 F. 2d 788, 798 n.6 (9th Cir. 1980), petition for cert. pending, No. 80-1390 (filed Feb. 17, 1981). Finally, petitioner was aware of the contents of the letters in question and therefore is not a victim of secret "blacklisting," as he contends (Pet. 25, 26).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04